Nos. 299 and 329.

IN THE

Supreme Court of the United States

OCTOBER TERM—1942.

No. 299.

JERSEY CENTRAL POWER & LIGHT COMPANY,
Petitioner.

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 329.

NEW JERSEY POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS.

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SUPPLEMENTAL MEMORANDUM FOR PETITIONERS.

At the argument of these cases the Court suggested that respondent might submit a memorandum on the reviewability by this Court of the Determination entered by the Commission (R. 936-9). Respondent has filed such a memorandum. Petitioners were granted leave to reply to or supplement any such memorandum.*

* On the question of reviewability petitioners in their main brief (p. 3) referred to the holding by the Court below that the Determination of the Commission was reviewable, and cited *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156; *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407.

Petitioners regret that respondent has seen fit to take advantage of the Court's suggestion by including in its memorandum arguments obviously directed to the merits of these cases. In view of the full briefing of the cases prior to oral argument, and the specific nature of the Court's suggestion, we have assumed that further briefing on the merits would be not only uncalled for but unacceptable. Accordingly, we shall refrain from reply in kind, correcting, however, at an appropriate place (see pp. 13-14, *infra*), certain erroneous statements of fact, purportedly taken from the record, relied on by respondent.

I.

The Commission's Determination Is Reviewable by this Court upon Petition of Jersey Central.

A. Jersey Central was a Party to the Proceeding before the Commission.

The original order to show cause issued by the Commission was entitled "*In the Matter of: New Jersey Power & Light Company and Jersey Central Power & Light Company*" (R. 1). Subsequent orders, including the order instituting the investigation and directing that a hearing be held, were similarly entitled (R. 9). Jersey Central was served (R. 27), and the original date for hearing was postponed at its request (R. 12). The colloquy in which counsel and the Commission's Examiner joined at the beginning of the hearing (R. 27-29) indicates that Jersey Central considered itself a party to the proceeding from the outset. However, out of abundance of caution, a petition to intervene as a party was filed by Jersey Central (R. 15-18) and granted by the Commission's Examiner (R. 19). Such intervention is expressly permitted under

Section 308 of the Act (49 Stat. 858, 16 U. S. C. A. Sec. 825g), which provides:

> "* * * In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may *admit as a party* any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or *any other person whose participation in the proceeding may be in the public interest.*"

The issue raised by Jersey Central, regardless of additional issues raised by New Jersey Power, was the status of Jersey Central. Jersey Central's petition to intervene concluded with the prayer that "the Commission make and enter a finding, determination and order that petitioner is not a public utility subject to the jurisdiction of the Federal Power Commission, under the terms of the Federal Power Act or otherwise" (R. 18). Jersey Central introduced oral testimony and exhibits, and exercised its right to cross-examine.

Accordingly, there can be no doubt that Jersey Central is a party to the present proceeding, and is bound by the Determination of the Commission. (See *Sunshine Coal Mining Co.* v. *Adkins*, 310 U. S. 381, 402-3). The Restatement of the Law of Judgments, promulgated by the American Law Institute, states:

> "A person may become a party or cease to be a party in a variety of ways. A person who intervenes as a contestant in a proceeding *is a party to the judgment* whether or not the court originally had jurisdiction over him, provided that before the judgment is finally entered he appears as a party." (Section 79, Comment f.)

B. The Nature of the Commission's Determination as it Affects Jersey Central.

Plainly, the name given by the Commission to its action ("Determination by the Commission", R. 936-9) is of no significance if in fact the result is to impose legal detriment upon either petitioner, so that it is a "party to a proceeding under this Act aggrieved by an order issued by the Commission" (49 Stat. 860, Sec. 313, 16 U. S. C. A., Sec. 825*l*).

> "The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."
>
> *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, 416.

The Determination of the Commission specifically found that "Jersey Central Power & Light Company is a 'public utility' within the meaning of the Federal Power Act" (R. 940). The order of the Commission denying the petitions for rehearing makes clear the separateness of the issues raised by each of the petitioners and states that:

> "* * * the Commission determined among other things that Jersey Central Power & Light Company was a 'public utility' as defined by the Federal Power Act, *and* that New Jersey Power & Light Company had violated the provisions of Section 203(a) of said Act. * * *" (R. 963). (Italics added.)

There was thus an adversary, quasi-judicial proceeding in which Jersey Central, given adequate notice and permitted to intervene as a party, exercised its opportunity to be heard throughout and specifically litigated the question of its status.

C. The Reviewability of the Commission's Determination That Jersey Central is a "Public Utility."

In *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, this Court stated, with respect to its jurisdiction to review an order of an administrative body: (1) that the Court must have before it a "case" or "controversy" under Article III of the Constitution; (2) that the specific terms of the statute granting review of the orders of such administrative body must be complied with; and (3) that under the "primary jurisdiction doctrine" the applicant for review must theretofore have exhausted the administrative process.

In the present cases the statutory prerequisites for review (49 Stat. 860, Sec. 313, 16 U. S. C. A. Sec. 825*l*) have been complied with. Applications for rehearing were filed and denied by the Commission (R. 963), and timely petitions for review were filed in the Circuit Court of Appeals (R. 1094, 1112). Petitions for writs of certiorari, having been duly filed, were granted on October 12, 1942. Furthermore, in the present cases the "primary jurisdiction doctrine" has been complied with. All issues of law and fact were presented to the Commission in the first instance, extended hearings were held, and the Commission made its determination of the issues presented.

In the *Rochester* case the Court adverted to the fact that even where an order of an administrative body is reviewable, the "range of issues open to review" is limited to "questions affecting constitutional power, statutory authority and the basic prerequisites of proof" (p. 140). The issues raised in these cases meet such requirements. The position of petitioner, Jersey Central, is that, after full hearing by the Commission, there is no substantial evidence, and indeed no evidence, in the record to support the conclusion that Jersey Central is a "public utility", as defined in the Act,

and that Jersey Central is in fact excluded from the definition of "public utility." New Jersey Power joins in this position and takes the further position that the transaction of stock acquisition was, in any event, by the terms of the Act specifically excluded from the jurisdiction of the Commission. No exercise of administrative discretion is involved. The questions raised are questions directly affecting "statutory authority and the basic prerequisites of proof."

(1) A Determination of Status by the Commission which Subjects Jersey Central to Legal Obligations is a "Case" or "Controversy."

In the *Rochester* case the order which was held to be reviewable was an order of the Federal Communications Commission determining that Rochester Telephone Corporation had the status of a "common carrier" under the Federal Communications Act. The order was reviewable since it was not a "mere abstract declaration of such status" but "necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority" (p. 144). The order thus, without more, had the effect of compelling or forbidding conduct on the part of the corporation. Similarly, in *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, a "regulation" promulgated by the Federal Communications Commission with respect to persons subject generally to its jurisdiction was held reviewable in view of the threat to the petitioner in that case of irreparable injury alleged to flow from such "regulation". Although a minority of the Court deemed such "regulation" not to be reviewable, it recognized that "If an administrative determination of status has the effect of subjecting a person to legal obligations, whether embodied in statute or previously formulated administrative

commands, or otherwise affecting legal rights, such a determination possesses the elements of a reviewable order" (p. 435).

(2) Jersey Central was Subjected to Legal Obligations as a Result of the Determination of its Status as a "Public Utility" by the Commission.

The Determination of the Commission was an adjudication with respect to the status of Jersey Central. Such adjudication was reviewable if it necessarily carried direction of obedience to mandatory administrative or statutory requirements. Such legal consequences did, in fact, immediately follow the Commission's Determination, since the Commission had issued the same type of "previously formulated mandatory orders addressed generally to all [public utilities] amenable to the Commission's authority" as had been issued by the Federal Communications Commission in the *Rochester* case.

Some of the Federal Power Commission's orders are collated in respondent's memorandum (page 2, footnote 2). The scope of such orders is by no means inconsiderable. They prescribe an entire system of accounts (Order No. 42), including detailed regulations regarding plant acquisition adjustments, original cost and depreciation accruals; they provide for the filing with the Commission of detailed reports and questionnaires regarding ownership and transfers of securities (Order No. 46-A, now rescinded); they provide for the filing of rate schedules and monthly reports (Order No. 44, Rule 205).* In addi-

* Compare the "previously formulated mandatory orders" in the *Rochester* case: "* * * These orders required all telephone carriers subject to the Act to file schedules of their charges, copies of contracts with other telephone carriers, information concerning their corporate and service history, their relations with affiliates, their use of franks and passes." (*Rochester* case, p. 127)

tion, the Act itself immediately operated to affect Jersey Central. Thus, Jersey Central's rates for alleged transmission of energy in interstate commerce immediately became subject to the mandatory provisions of Section 205(a) and (b).

All these requirements carried with them the sanctions provided in the Act, viz.: civil (Section 314) or criminal (Section 316) action, or forfeiture of $500 per day (Section 315).

The instant Determination was not a "mere abstract declaration of status." Nor was it a "stage in an incomplete process of administrative adjudication" (*Rochester* case, p. 143). It is in sharp contrast to the order of the Commission in *Canadian River Gas Company* v. *Federal Power Commission*, 110 F. (2d) 350, cert. den., 311 U. S. 693. There the Commission sent a questionnaire to a company requesting certain information bearing on its status under the Natural Gas Act. Under protest the company answered the questionnaire and supplied the information. The Commission then issued an order which (1) recited that the company was a "natural gas company", and (2) instituted an investigation to determine the reasonableness of the company's rates. Thereupon, *before any hearings were held and before any further facts were heard*, the company petitioned the United States Circuit Court of Appeals for review of the order under Section 313(b) of the Act. The Court properly dismissed the petition on the ground that the order was "in no proper sense a definitive order" and was "a mere step in procedure."

II.

The Commission's Determination is Reviewable by this Court Upon Petition of New Jersey Power.

It appeared to petitioners at oral argument that no question was raised as to the reviewability of the Commission's Determination so far as New Jersey Power is concerned. However, in order that there may be no doubt on this point, New Jersey Power desires to point out that:

(1) The terms of the statute granting review have been complied with;

(2) The "primary jurisdiction doctrine" has been satisfied; and

(3) The Court has before it a "case" or "controversy."

The first two matters have been adequately discussed at an earlier point in this memorandum (*supra*, p. 5). We shall, therefore, consider merely whether, so far as New Jersey Power is concerned, the order of the Commission presents a "case" or "controversy."

A. The Nature of the Commission's Determination.

The Determination of the Commission finds that New Jersey Power "acquired such securities in violation of the express provisions of Section 203(a) of the Federal Power Act." (R. 940) The threat to New Jersey Power of injury as a result of such determination clearly presents a "case" or "controversy".

In *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. the Court, in considering the Federal Declaratory Judgment Act, said: (pp. 240-241)

> "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *. Where there is such a concrete case * * * the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages."

Similarly, in *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407, the Court held that a "regulation" promulgated by the Federal Communications Commission with respect to all broadcasting licensees was reviewable under the Urgent Deficiencies Act, upon the petition of a so-called chain broadcasting company, because of the adverse effect which such "regulation", although not directed to such companies specifically, had upon the contractual relations of such companies with the broadcasting licensees. The Court said (p. 417):

> "The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for noncompliance."

A fortiori, the instant Determination presents a "case" or "controversy", in view of the threat to New Jersey Power of injury flowing from it, particularly since it is one of the two persons to whom the Determination was specifically directed.

B. Injury Resulting to New Jersey Power from the Commission's Determination.

The determination by the Commission that New Jersey Power, by its stock acquisition, had violated the Federal Power Act adversely affected New Jersey Power in at least the following respects:

(a) Under Section 316(a) of the Act any person who wilfully and knowingly "suffers to be done any act, matter, or thing in this Act prohibited or declared to be unlawful or who wilfully and knowingly *omits or fails to do any act, matter or thing in this Act required to be done, or wilfully and knowingly causes or suffers such omission or failure*" [italics supplied] commits a penal offense subject to a fine of not more than $5,000 or imprisonment for not more than two years or both. Consequently, if review of the Commission's Determination had not been sought, New Jersey Power or its officers would have run the risk of criminal prosecution for omitting or failing to take action to rectify the supposed illegality of the stock acquisition. Clearly, "disregard of the Commission's adverse action entails threat of oppressive penalties" (*Rochester* case, p. 132).

(b) The Determination of the Commission immediately cast a cloud upon New Jersey Power's title to its substantial investment ($4,312,308, R. 6) in Jersey Central stock. If such acquisition violated Section 203(a) of the Act, it is not clear whether the title of New Jersey Power is "void" or "voidable" (See *Oklahoma Gas and Electric Company*, Federal Power Commission Opinion No. 38, July 6, 1939); but, in any event, the right of New Jersey Power freely to dispose of its Jersey Central stock has been impaired.

By virtue of the Commission's Determination, New Jersey Power was adversely affected even more directly

and substantially than was the party accorded review of the order of the Commission in *Federal Power Commission* v. *Pacific Power and Light Company*, 307 U. S. 156. In that case application was made for authorization to merge the facilities of two public utilities under Section 203(a) of the Act, and such authorization was denied. The order thus had the effect of denying prospectively the exercise of a privilege deemed available under the Act. In the present case, New Jersey Power believed that it had the privilege of acquiring the stock of Jersey Central without authorization by the Commission, and exercised such privilege. The Determination of the Commission not only denied that such privilege existed, but affirmatively held that New Jersey Power had violated the Act, thereby subjecting it to the detriment and risk of penalties referred to above.

III.

Correction of Statements of Fact, Purportedly Based on the Record, Contained in Respondent's Memorandum.

In its memorandum filed with the Court on January 15, 1943, respondent has argued, as do petitioners, that the order in question is reviewable, and that the cases do not involve merely the exercise of administrative discretion. However, under the guise of comparing the Federal Communications Act with the Federal Power Act—and thus showing the applicability of the Court's decision in the *Rochester* case—respondent abruptly introduces arguments directed to the merits rather than to the question of reviewability (Respondent's Memorandum, pp. 3-5). For reasons indicated at the beginning of this memorandum, we are not replying to the efforts of respondent to answer

certain questions put by the Court at oral argument, or to the unsupported or erroneous arguments not addressed to the reviewability of the Determination (Respondent's Memorandum, pp. 3-5, particularly footnotes 7, 8 and 9). However, we find it necessary to correct certain statements of fact which are so plainly contrary to the record that we must point out their falsity lest we be deemed to acquiesce in them.

(1) On page 3, footnote 6, respondent states that "• • • certainly no question of *de minimis* need be decided in this case where the amount of energy involved is substantially over 93% (Exh. 16A, R. 1004) of an amount which would supply 4,260 average residential consumers for the same period of time (R. 625)."

The record references by respondent have no relation whatever to each other, the figure of "4260" being indeed the result of a purely hypothetical calculation (R. 623). The "93%" referred to by respondent is the "Percent of Total Power Supplied to Mechanic St." (i.e., to Public Service) by Jersey Central at *two moments of time*, both on December 15, 1937 (see Comm. Exh. No. 16A, R. 1004). At the instant of one of those readings (8:30 P. M.) there was a flow to Staten Island of 500 *kilowatts* of slop-over energy from Mechanic Street; at the instant of the other reading (9:00 P. M.) there was a flow to Staten Island of 1,000 *kilowatts* of such energy (Comm. Exh. 13, R. 1002). In both instances—as on all 24 instances shown on Exhibit 16A—the *duration* of flow is not shown, and therefore the kilowatt hours transferred are unknown. These two moments were selected from the 25,500 already referred to many times. The amount of energy "which would supply 4,260 average residential customers" is the 3,093,400 kilowatt *hours* of energy which was stated in the

record to be the total amount of energy received by Staten Island from Public Service *during the entire year 1937* (R. 623, 625, Comm. Exh. No. 6, R. 978). This figure of 3,093,400 kilowatt hours appears in the record only as a *total*, with no indication whatever as to what portion of such energy was generated by Jersey Central.

In using the figure of 93% appearing on Exhibit 16A—the key exhibit intended by the Commission to show that some energy generated by Jersey Central reached Staten Island—respondent can have no purpose other than to lead this Court to believe that at least 93% of *all* the energy received by Staten Island from Public Service in the year 1937 was generated by Jersey Central. As contained in respondent's memorandum, the statement is made as though it were a fact in the record; obviously this is not true. As a deduction drawn by counsel for respondent, the statement is fantastic, based as it is on a sampling at two (or at most 12) moments of time during the entire year!

Respectfully submitted,

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